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No. 95-586

Supreme Court, U.S.
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In The

SUPREME COURT of the UNITED STATES
October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,
v.
GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

RESPONDENT'S OPPOSITION TO MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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TABLE OF AUTHORITIES

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♦

Petitioner has moved the Supreme Court to Grant Writ of Certiorari and to Vacate Opinion and Decision for Want of Jurisdiction. The Petitioner's subject matter jurisdiction arguments have not

been considered or decided by any lower court. In fact, just two weeks prior to the Petitioner's Motion to the Supreme Court, the Petitioner filed a Motion raising the very same subject matter jurisdiction challenge in the district court. The district court Motion has not yet been briefed, argued, or decided.

The Petitioner's Motion bases its challenge on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996). However, the Petitioner fails to mention the fact that the State of Wisconsin has expressly waived its sovereign immunity with respect to actions for overtime wages brought pursuant to the provisions of the Fair Labor Standards Act. *See*, §§ 109.01(2), 109.01(3), 109.03(5), 103.01(1)(b), 103.02, Wis. Stats. and Ind. §§ 74.01(4), 74.015, 74.08 Wis. Adm. Code. Therefore, even assuming *arguendo* that the Seminole Tribe decision applies to actions brought pursuant to the Fair Labor Standards Act, Seminole Tribe does not provide any additional basis for granting the State of Wisconsin's Petition under the present facts. *See e.g.*, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1, Estate of Porter by Nelson v. State of Illinois, 36 F.3d 684 ,690 (7th Cir. 1994) ("A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program").

Furthermore, three additional circuits have now rendered decisions consistent with the Seventh Circuit's holding in Mueller v. Reich, 54 F.3d 438

(7th Cir. 1995) upholding the application of 29 C.F.R. § 541.118(a)(5) to the public sector. *See*, Yourman v. Dinkins, 1996 WL 284688 (2nd Cir. 1996), Balgowan v. New Jersey, 1996 WL 255930 (3rd Cir. 1996), Carpenter v. City and County of Denver, 82 F.3d 353, 356 (10th Cir. 1996). The Circuits are in complete uniformity on this issue.

This court should not accept Petitioner's invitation to act precipitously in endorsing the Petitioner's subject matter jurisdiction challenge. Petitioner's Motion to Grant Writ of Certiorari and to Vacate Opinion and Decision for Want of Jurisdiction should be denied. In the event this court decides to vacate the court of appeals decision and remand it for further consideration in light of Seminole Tribe, the issues certified for consideration on remand should include (1) whether the holding in Seminole Tribe reaches actions brought pursuant to the Fair Labor Standards Act, and (2) whether the State of Wisconsin has waived its Eleventh Amendment immunity with respect to such actions.

Respectfully Submitted,

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